Title

Liability of trust beneficiary who litigates vexatiously or participates in a breach of trust

Text

The Restatement (Third) of Trusts, specifically §104, lists four general areas in which the beneficiary's actions may lead to an assumption of internal liability to the trust estate: (1) A loan or advance to the beneficiary from the trust; (2) The beneficiary's debt to the settlor that has been placed in the trust, unless the settlor manifested a contrary intention; (3) The trust suffered a loss resulting from a breach of trust in which the beneficiary participated; and (4) Liability imposed by other law, such as the law of contract, tort, or unjust enrichment.

Consider the beneficiary's liability in tort for engaging in vexatious litigation. If a beneficiary engages in frivolous litigation against the trustee, or against the trust relationship itself, the beneficiary's equitable interest under the trust may be charged with the attendant costs. Thus, if a beneficiary engages in vexatious and burdensome litigation against the trustee and the other beneficiaries, the court may order that the attorneys' fees of all the defendants be charged against the plaintiff-beneficiary's equitable interest to the extent the interest is identifiable, discrete, and severable. When a beneficiary litigates vexatiously, obdurately, or in bad faith, the trustee may have a fiduciary duty to the other beneficiaries to bring an action against the beneficiary to compel the beneficiary to reimburse the trust estate for the trustee's attorneys' fees and other litigation costs. Circumstances even may warrant that an action be brought on behalf of the trust against the nuisance beneficiary's counsel as well. In Missouri, the litigious non-prevailing beneficiary need not have engaged in intentional misconduct or litigated in bad faith to end up personally on the hook for the trustee's attorney's fees, at least to the extent of his distributive share. See O'Riley v. U.S. Bank, 412 S.W.3d 400 (Mo. Ct. App. 2013). Vexatious litigation being a tort, recourse need not be limited to the culpable beneficiary's equitable property interest incident to the particular trust relationship. His or her non-trust assets should be fair game as well.

Or consider the beneficiary's liability for participating in a breach of trust. To the extent the culpable beneficiary's equitable property interest incident to the trust relationship can be untangled and separated out from the interests of the other beneficiaries, then "the trust" is entitled to a charge on the interest to secure payment of the beneficiary's liability for participating in the breach. That the interest is subject to a spendthrift restraint would not be a defense. The constellation of equitable property rights of the permissible beneficiary of a fully discretionary non-self-settled irrevocable trust is an example of an interest that is so contingent and speculative that it cannot be untangled and separated out from the principal and income interests of the other beneficiaries. Of course, there is always the charging or "if, as and when" order. See generally §5.3.4.1 of *Loring and Rounds: A Trustee's Handbook* (2025), the relevant portion of which section is reproduced in the appendix below. That having been said, had the culpable beneficiary also been a trustee, a protector-fiduciary, or an agent-fiduciary of some party to the trust relationship, then those aggrieved might well be entitled to a charge against any of the beneficiary's unencumbered property that may reside outside the discretionary trust.

It is self-evident that a culpable beneficiary's non-discretionary equitable life interest in a percentage of all trust-accounting income also would not be available to the aggrieved once the beneficiary has died. See, e.g., *Holte v. Rigby*, 2025 WL 1185823 (N.D. 2025), which involved an irrevocable trust. Current life beneficiaries were entitled to all net trust-accounting income, *but not to principal*. One co-beneficiary also was the trustee. During his tenure he misappropriated a portion of another co-beneficiary's life interest in the trust's equitable income stream. Upon the trustee-beneficiary's death, his daughter became entitled pursuant to the terms of the trust to an equitable life interest in the trust's equitable income stream equivalent to the equitable life interest her father had enjoyed. The misappropriation was discovered by the successor trustees. They endeavored to remedy the unjust enrichment by reaching and applying the equitable income interest of the daughter, who was totally innocent of the misappropriation. As there was no nexus between the innocent daughter's newly acquired interest in the trust's equitable income stream and the misappropriation, her equitable interest could not be reached in satisfaction of her late father's fiduciary liability. The father was the one who had perpetrated the misappropriation, but his interest in the trust's equitable income stream had extinguished at his death. Of course, had any misappropriated principal come into the daughter's hands, there had been no such misappropriation, that property interest would have been reachable. And the father's probate estate remained fair game. So also any traceable misappropriated income that had found its way into the hands of a non-BFP third party.

Appendix

§5.3.4.1 Spousal Rights in Common Law States [from *Loring and Rounds: A Trustee's Handbook* (2025)].

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Some courts have avoided the problems inherent in valuing equitable interests under discretionary trusts by providing that at least a portion of any future distributions made by the trustee be physically allocated to the nonbeneficiary spouse. One court has issued an order to the trustee allocating 20 percent of any future distributions actually made to the wife (in her capacity as beneficiary of a discretionary trust) to her husband.[483] This is known as a "when, as, and if received" or "if and when received" or "if, as, and when received" order.[484] It is a form of charging order.[485] In Florida, it is referred to as a writ of garnishment.[486] Courts in other states also have

[483]Leavitt v. Leavitt, Commonwealth of Massachusetts, The Trial Court, Probate and Family Court Dept., Essex Division, Docket No. 95D-1951-DVI (1995) (order upheld in S.L. v. R.L., 55 Mass. App. Ct. 880, 774 N.E.2d 1179 (2002)). *See also* van Oosting v. van Oosting, 521 N.W.2d 93, 98 (N.D. 1994) (holding that "[o]n remand the appropriate method of distribution, therefore, would be the award to Shirley of a percentage of future payments that would have otherwise gone to Bruce").

[484]Williams v. Massa, 431 Mass. 619, 628, 728 N.E.2d 932, 941 (2000).

[485]Hamilton v. Drogo, 241 N.Y. 401, 150 N.E. 496 (1926) (ordering attachment of future discretionary distributions, if any, after "allotment" by the trustee but before delivery is effected to the beneficiary). *See generally* §5.3.3 of this handbook (rights of beneficiary's creditors and others to trust property).

[486]*See, e.g.*, Berlinger v. Casselberry, 133 So. 3d 961 (Fla. Dist. Ct. App. 2013).

issued such orders in the divorce context.[487]

Some divorce courts, however, have declined to include contingent interests in the calculation of the value of marital estates for equitable distribution purposes. One court, for example, did not include the value of a spouse's equitable contingent remainder in computing the marital estate.[488] It also declined to issue a charging order.[489] The appellate court affirmed the decision, noting that "[n]either the present assignment of a percentage of a contingent interest's value, nor a future award on an 'if and when' basis, avoids administrative hardships inherent in the valuation of expectant interests or in the requirement of continued court supervision."[490] Another divorce court took a spouse's vested equitable remainder off the table for marital estate computation purposes. Why? Because the equitable interest was subject to the condition subsequent of his mother not exercising her limited testamentary power of appointment. This decision also was affirmed on appeal.[491] One court has endeavored to clear up some confusion as to what equitable property interests are vested and what are contingent under long-standing principles of property and trust law.[492] An interest subject to the condition precedent of the trustee's exercise of discretion, for example, is contingent.[493] So is an interest subject to the condition precedent of survivorship.[494] "However, even when a party's remainder interest in a trust cannot strictly be characterized as vested, it still may be included, in appropriate instances, within the marital estate."[495] One's contingent equitable interest in a discretionary trust is still technically an interest in property, *i.e.*, something more than a mere expectancy or hope.[496]

Presumably a court should give serious consideration to discounting a spouse's nonpossessory equitable interest to its present value. For some interesting and helpful musings on how a court might go about valuing future equitable interests in the divorce context, the reader is referred to

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[487]*See, e.g.*, van Oosting v. van Oosting, 521 N.W.2d 93 (N.D. 1994) (snaring any distributions to the current beneficiary); Flaherty v. Flaherty, 638 A.2d 1254 (N.H. 1994) (snaring any remainder distributions). In Zuger v. Zuger, 563 N.W.2d 804 (N.D. 1997), the North Dakota Supreme Court again took the charging order route, although its grasp of the fundamentals of property and trust law seems less than firm: Zuger v. Zuger, 563 N.W.2d 804, 806 (N.D. 1997). As to why, *see generally* §8.30 of this handbook (the difference between a vested equitable remainder subject to divestment and a vested (transmissible) contingent equitable remainder).

[488]Williams v. Massa, 431 Mass. 619, 628, 728 N.E.2d 932, 941 (2000).

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[491]Marriage of Beadle, 1998 Mont. 225, 968 P.2d 698 (1998). *Cf.* S.L. v. R.L., 55 Mass. App. Ct. 880, 774 N.E.2d 1179 (2002) (a spouse's contingent equitable remainder interest in a trust established by her father was taken off the table for marital estate computation purposes not because of her mother's general inter vivos power of appointment over the trust property but because of her mother's testamentary power of appointment over the trust property, although the nonexercise of both powers was a condition precedent to the spouse receiving an interest under the trust as was the condition precedent that she survive her mother).

[492]D.L. v. G.L., 61 Mass. App. Ct. 488, 811 N.E.2d 1013 (2004).

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[496]*See generally* Kevin D. Millard, *Rights of a Trust Beneficiary's Creditors under the Uniform Trust Code*, 34 ACTEC L.J. 58, 72 (Spring 2008) (explaining the difference between an expectancy and a contingent equitable property interest in the context of divorce litigation).

Marc A. Chorney.[497] In some situations, a court may want to piggy-back on the Internal Revenue Code's actuarial valuation tables in order to avoid getting bogged down in the actual facts and circumstances of a given situation, *e.g.*, "the health of beneficiaries, the specific assets held in trust, the past performance of trust investments, the projections for future performance, the prior trust distributions, the identity of the trustees, and a number of other subjective factors."[498] IRC §7520 "is a present value calculation that applies mortality and interest rate factors mandated by the Code."[499] Unfortunately, these tables are not particularly helpful when it comes to valuing equitable interests that are subject to possible diversion to third parties due to the exercise of fiduciary or nonfiduciary powers of appointment, or the happening of other such difficult-to-quantify contingencies.

For purposes of ascertaining the economic circumstances of parties to a divorce, the estate plans of third parties may be discoverable, *e.g.*, the revocable inter vivos trust of a spouse's living parent. In Massachusetts, "expectancy" discovery would generally be limited to obtaining an affidavit from the parent as to his or her net worth, rounded to the nearest $550,000; a general description of the current estate plan; and the date the estate plan was last revised.[500] Still, one cannot help but wonder whether the U.S. Constitution would impose additional limitations on how far a state incident to a divorce action could intrude upon the privacy expectations of innocent third parties.

For more on the laws of property division in the context of divorce, the reader is referred to John Gregory, Janet Richards, and Sheryl Wolf.[501]

Whatever the degree of the trust's vulnerability, it always should be kept in mind that the trustee's primary allegiance is to the beneficiary, not to the nonbeneficiary spouse or ex-spouse. Thus, when there is marital discord, the trustee must suppress any personal feelings as to who may be "at fault" and vigorously defend—within reason and to the extent the law allows—the beneficiary's equitable property interest. As the English say, "[t]rustees have the custody of the property: they do not keep the conscience of their beneficiary."[502] A trustee may even have a fiduciary duty to challenge, at trust expense, a charging order that interferes with the trustee's ability to carry out the settlor's intentions.[503] "Although the process and division may reflect the concept of marriage as a shared enterprise or partnership, this process and division likely will be counter to the intent of the trust's settlor and perhaps will require the participation of the family members of a beneficiary in the proceedings."[504] The trustee's duty to defend the trust and its dispositive terms is taken up in §6.2.6 of this handbook.

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[497]*Interests in Trusts as Property in Dissolution of Marriage: Identification and Valuation,* 40 Real Prop. Prob. & Tr. J. 1, 30–35 (Spring 2005).

[498]Marc A. Chorney, *Interests in Trusts as Property in Dissolution of Marriage: Identification and Valuation*, 40 Real Prop. Prob. & Tr. J. 1, 31 (Spring 2005).

[499]Marc A. Chorney, *Interests in Trusts as Property in Dissolution of Marriage: Identification and Valuation*, 40 Real Prop. Prob. & Tr. J. 1, 31 (Spring 2005).

[500]*See generally* Gerald L. Nissenbaum & Wendy J. Overbaugh, *What you need to know about Vaughn affidavits*, 35 MLW 575 (Oct. 30, 2006) [Massachusetts Lawyers Weekly].

[501]Property Division in Divorce Proceedings: A Fifty State Guide (Aspen Publishers Inc. 2004).

[502]Lewin ¶20-161 (England).

[503]*See* Hodel v. Irving, 481 U.S. 704, 715 (1987) (noting that the right to pass on property is a property right subject to Fifth Amendment protection).

[504]Marc A. Chorney, *Interests in Trusts as Property in Dissolution of Marriage: Identification and Valuation*, 40 Real Prop. Prob. & Tr. J. 1, 3 (Spring 2005).

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